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IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1089

RICHARD OSEREDZUK,

Appellant,

v.

WARNER COMPANY,

Appellee.

MOTION OF APPELLEE TO AFFIRM THE JUDGMENT OF THE COURT BELOW ON THE GROUND THAT IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

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STATEMENT OF THE QUESTION PRESENTED.

Did not the Court below properly decide that it had no jurisdiction over the cause where the plaintiff was injured during the course of his employment aboard a vessel owned by appellee on a land locked, man made lake over ground owned by appellee that was solely within the boundaries of the Commonwealth of Pennsylvania.

STATEMENT OF THE CASE.

The action of Appellant was instituted in the United States District Court for the Eastern District of Pennsylvania to recover damages for injuries sustained during the course of his employment by appellee on December 10, 1969. At that time, Appellant was working aboard a vessel owned by appellee that was operated on Van Sciver Lake (Appendix 15a-16a). Van Sciver Lake is a man made land locked lake existing upon property owned by appellee and was created by the process of dredging sand and gravel that began sometime in the 1920's (Appendix 37a, 38b and 67a).

Sand and gravel are dredged from the lake bed and used in the operations of appellee. As the product being dredged in an area becomes exhausted, the dredge moves to another area of the lake. As a result, the size and shape of the lake changes (Appendix 73a-74a). Van Sciver Lake is some distance from the Delaware River. Adjacent to it, and between it and the Delaware River, is Penn Manor Lake, another man-made land locked lake. No dredging operations are performed in Penn Manor Lake and it is separated from Van Sciver Lake by a dike (Appendix 67a).

Neither of the lakes has any navigational access to the Delaware River. There has never been a navigable channel, stream, lock or other device to permit a vessel to navigate from Van Sciver Lake. There are no plans to put in locks or other devices that would allow ingress or egress by a vessel from Van Sciver Lake (Appendix 62a).

At the time that the incident giving rise to this accident occurred there were two dredges working on Van Sciver Lake. The first one had been built on the lake (Appendix 50a). The second, being the dredge VIKING, began working on Van Sciver Lake in October 1970 (Appendix 69a). It had been brought up the Delaware River to the

Franklin Basin which is a tidal basin off that River. That basin was separated from Van Sciver Lake by land that measured approximately one thousand feet in width (Appendix 71a).

The dredge was moved from Franklin Basin to Van Sciver Lake in the following manner. A bulldozer was used to lower the level of the land. Then the dredge proceeded to dredge out an area which filled with water of sufficient depth to float it. The dredge then began to dredge out a path to its front while the bulldozer was used to refill the area it had lowered thus sealing off any flow from the Franklin Basin. The dredge then dug out its own path dredging in front and filling in behind as it went with the result that when it reached Van Sciver Lake the path behind it had been backfilled. At no time was there an opening running between Franklin Basin and Van Sciver Lake (Appendix 76a).

As owner of the area surrounding and under Van Sciver and Penn Manor Lakes, Warner Company entered into a lease of those premises with the Penn Manor Realty Co., Inc. which operates the Penn Manor Hunting and Fishing Club (Appendix 45a and 65a). As a result of these arrangements, private pleasure boats also use the lakes. These boats are brought to the water over land and not through the Delaware River (Appendix 69a).

ARGUMENT.

There is no Admiralty or Maritime Jurisdiction in the Federal Court for Injuries Sustained by an Individual Working on a Land Locked Man-Made Lake Located Solely Within the Boundaries of One State.

In the brief of appellant he argues several bases for admiralty and maritime jurisdiction. He urges that the nature of the services that plaintiff performed established the navigability of Van Sciver Lake. He argues that the type of vessel involved establishes navigability. Appellee will concede that if this claimed accident occurred upon a navigable waterway of the United States that appellant would be entitled to pursue his remedies under the Jones Act, 46 U. S. C. A. § 688.

The appellant has elected to pursue recovery based upon the Jones Act (4a). As was found by the learned Trial Judge, "a Jones Act cause of action does require, inter alia, the presence of a 'navigable' body of water in order to confer federal jurisdiction". *McKie v. Diamond Marine Co.*, 204 F. 2d 132 (5th Cir. 1963); *Gahagan Const. Corp. v. Armao*, 165 F. 2d 301 (1st Cir. 1948) (81a). Accordingly, the nature of appellee's operations, the nature of appellant's duties and/or the type of vessel involved are irrelevant to the issue involved in this appeal. The sole question for determination is whether Van Sciver Lake was navigable at the time of the incident involved herein within the meaning of the Admiralty and Maritime jurisdiction of the United States.

In appellant's brief he has cited *Gilmore and Black* where he quotes from their treatise as follows:

> . . . Briefly, the admiralty jurisdiction of the United States extends to all waters, salt and fresh, with or without tides, natural or artificial, which are, in fact,

> navigable in interstate or foreign water commerce, whether or not the particular body of water is wholely within a state, and whether or not the occurrence or transaction that is the subject matter of the suit is confined to one state.

However, what has been quoted by the appellant is only part of the expression of opinion being recited by the authors. This above quoted passage continues:

> Thus, the Erie Canal is within the jurisdiction, though wholely within the State of New York, for it is navigated in interstate water commerce. The status of the Great Lakes and the Mississippi and its tributaries is clear; they are within the jurisdiction. What decisions there are point to the commonsense conclusion that small bodies of water, wholely in one state and not navigable in interstate or foreign commerce, are not included (Emphasis supplied) (Gilmore and Black pp. 28-29, 1957).

Accordingly, applying the test above recited there is no question but that Van Sciver Lake is not included within the admiralty jurisdiction of the United States.

The question of Admiralty jurisdiction must be determined by the character of the waterway at the time of the loss giving rise to the litigation. *Doran v. Lee,* 287 F. Supp. 807 (W. D. Pa. 1968); *Shogry v. Lewis,* 225 F. Supp. 741 (W. D. Pa. 1964). As the court stated in *Doran, supra* in referring to Maritime law:

> Such law must be applied in all waters forming part of the stream of interstate or foreign commerce, but the limitations of the exercise of jurisdiction by the United States' Courts prohibits its application to what are essentially common law actions of an exclusively local nature.

> Inland lakes having no existing connection to other watercourses by which a stream of commerce is or may be carried had been declared not to be within the admiralty jurisdiction (Citing cases) (At 810).

Appellant at page seven of his brief attempts to establish a direct connection between Van Sciver Lake and the Delaware River by means of an inlet between the two bodies of water. An inlet has been defined as a narrow opening by which a body of water penetrates into the land. *deKerchove, International Maritime Dictionary* (2nd Ed. 1961). Although there was testimony to the effect that an inlet was used, the description of the method conclusively shows that one was not created. The dredge dug out an area to its forward end of sufficient depth to float it. It then continued dredging forward and filling in the area at its aft end that it had just traversed. The result was that at any given moment the dredge was operating only in water sufficient for it to remain afloat, completely surrounded on all sides by land while it traversed the one thousand feet of land that separated Van Sciver Lake from the Franklin Basin of the Delaware River (Appendix 71a-76a).

The case of *Madole v. Johnson*, 241 F. Supp. 379 (W. D. La., 1965) and *Loc-Wood Boat and Motors, Inc. v. Rockwell*, 245 F. 2d 306 (8th Cir., 1957) cited by appellant in his brief fail to support his position with respect to the claim that the Van Sciver Lake is a navigable water of the United States. Each of those cases dealt with personal injuries that were sustained on a lake that had been formed by the building of a dam across a river which previously had been a navigable river of the United States and as such was clearly within the Admiralty and Maritime jurisdiction of the United States. However, such is not the case here

where Van Sciver Lake has never been a navigable water of the United States.

The appellant also quotes the classic definition of navigable waterways as recited in *The Daniel Ball,* 19 L. Ed. at 1001. This definition requires that for waters to be navigable they must, in their ordinary condition by themselves, or by uniting with other waters, form a continued highway over which commerce is or may be carried in interstate or foreign commerce in the customary modes in which such commerce is conducted by water. Appellant urges that this definition indicates that the basic test is the commercial nature of the business. Rather, this test clearly requires that the waterways, in their natural state, be able to carry commerce *"in the customary modes in which such commerce is conducted by water"* (*The Daniel Ball* at 1001) (Emphasis supplied).

It is uncontradicted in the record of this case that Van Sciver Lake is land-locked. It is established that Van Sciver Lake is man-made and has always been land-locked. Accordingly, there is no possible manner by which Van Sciver Lake could be considered a continued highway for commerce conducted by water.

Appellant places reliance upon the case of *Dow Chemical Company v. Dixie Carriers, Inc.,* 330 F. Supp. 1304 (S. D. Texas 1971). That case has no relevance to the facts involved herein. In that case, a canal was private but was connected with intercoastal waterways. It clearly had a direct connection by water with intercoastal commerce and was capable, in fact, of supporting and did indeed support the customary modes of commerce conducted by water as is required. Van Sciver Lake, being land-locked, is clearly distinguishable from the canal in the *Dow Chemical* case.

Appellant contends that the court must also consider the feasibility of making Van Sciver Lake navigable to determine Admiralty jurisdiction. This position concedes

the fact that in its present state Van Sciver Lake is not a navigable water of the United States. The cases upon which appellant relies for this proposition are cases interpreting the expanse of the interstate commerce clause.

The Court stated in *Doran v. Lee, supra:*

> Commerce clause of the Constitution defines the powers of the Congress to legislate but it cannot be used to enlarge the specific jurisdiction of the United States in Admiralty. The powers of Congress to legislate are greater than the powers of the Federal Courts to adjudicate.

Appellant admits that the exercise by Congress of its power to regulate interstate commerce under the Federal Power Act is based on unique economic considerations. An analysis of the major cases dealing with an interpretation of navigability indicates that there have been three principal sources of litigation, namely Admiralty matters, questions involving proprietary rights in rivers and those cases involving the Interstate Commerce interest of the Federal Government with respect to dams and bridges on and over waterways.

In the property and commerce cases, the test outlined in *The Daniel Ball* and *U. S. v. Appalachian Power Co.*, 311 U. S. 377, 85 L. Ed. 243 (1940) are liberally construed with respect to a determination of whether or not a stream is a navigable water of the United States. However, the admiralty courts usually rely on admiralty holdings and do not apply the proprietary or commerce test to strictly admiralty matters.

As was stated by the United States Court of Appeals for the 5th Circuit in the case of *The Lucky Lindy*, 76 F. 2d 561 (1935) quoting from an opinion of Mr. Justice Clifford, in *The Belfast*, 7 Wall. 624, 640, 19 L. Ed. 266:

> "Difficulties attend every attempt to define the exact limitations of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants."

The opinion of the Court in *The Lucky Lindy, supra* can be interpreted to stand for the proposition that the power of Congress to regulate interstate commerce requires a lesser degree of navigation than that required in the admiralty cases and that that court was of the opinion that the commerce cases had no relevance in an admiralty issue.[1]

CONCLUSION.

In summary, it is apparent that the body of water upon which this incident occurred is not nor ever has been navigable within the meaning of the admiralty and maritime jurisdiction of the United States. This incident occurred exclusively within the confines of the Commonwealth of Pennsylvania. Accordingly, it is for that state through its legislation and common law to determine the rights and remedies of the appellant and it is for the courts of that state to adjudicate these rights and remedies. The Order of the Trial Judge dismissing Appellant's action should be affirmed.

Respectfully submitted,

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1. See generally, Quinn, "An Analysis of Navigable Waters of the United States", XVII Baylor Law Review, No. 4, Fall 1966.